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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 309(j) and 337 of)
the Communications Act of 1934 as Amended)

WT Docket No. 99-87 ✓

Promotion of Spectrum Efficient Technologies)
on Certain Part 90 Frequencies)

RM-9332

Establishment of Public Service Radio Pool in)
the Private Mobile Frequencies Below 800 MHz)

To: The Commission

**REPLY COMMENTS
 OF THE
AMERICAN PETROLEUM INSTITUTE**

**THE AMERICAN PETROLEUM
 INSTITUTE**

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Dated: September 30, 1999

No. of Copies rec'd 0+9
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SUMMARY

The Balanced Budget Act of 1997 did not give the Commission the authority to auction private spectrum at whim. Instead, and as nearly every commenting party in this proceeding has pointed out, the Commission may only conduct auctions where there are mutually exclusive applications for initial licenses, and Congress has highlighted the Commission's obligation to seek to avoid mutual exclusivity through engineering solutions or other available methods. Because such mutual exclusivity typically is avoided through the site-by-site licensing approach presently employed in the private radio bands, the Commission does not have the authority to conduct auctions here. Nor would the geographic licensing and auction of private spectrum promote the Commission's "public interest objectives," given the overwhelming consensus that site-by-site licensing is most efficient in this instance and best meets the needs of private licensees and the public that they serve. Accordingly, the Commission should reject outright the position of those (few) parties who seek -- in violation of the Budget Act and to the detriment of the public interest -- to commercialize private spectrum through auctions and, in essence, eradicate all private operations.

API also urges the Commission to confirm that Critical Infrastructure entities such as pipelines, petroleum companies, utilities and railroads are included within the auction exemption for "public safety radio services." Congress, the Commission and numerous commenting parties (in both this and prior proceedings) repeatedly have recognized that

such entities rely heavily on private radio systems to perform important safety-related functions. These entities must continue to have access to spectrum outside of the auction process and, as a practical matter, should be permitted to use auction-exempt spectrum for both safety-related and other internal communications. API and numerous other commenters further believe that the exemption would most effectively and appropriately be implemented through the creation of a separate frequency pool for auction-exempt, non-governmental licensees.

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**REPLY COMMENTS
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The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits the following Reply Comments regarding Comments filed by other participants in response to the Commission's *Notice of Proposed Rule Making ("NPRM")*^{1/} in the above-referenced proceeding.^{2/}

^{1/} 64 Fed. Reg. 23571 (May 3, 1999).

^{2/} By *Order* dated May 19, 1999 (DA 99-950), the Commission extended the Reply Comment deadline in this proceeding from August 2, 1999 to September 16, 1999. The deadline was further extended to September 30, 1999 by *Order* dated September 10, 1999 (DA 99-1861).

I. REPLY COMMENTS

1. Due to the breadth and potential impact of the issues raised in the *NPRM*, this proceeding has generated a great deal of interest. As a result, the Commission already has amassed an extensive record, with Comments having been filed by a wide range of private spectrum users, trade associations, equipment manufacturers and other interested parties. API does not intend to waste the Commission's time by rehashing at length the opinions expressed in its own initial Comments or those of other parties. Rather, the purpose of these Reply Comments is to identify several areas where there is widespread agreement (and where, accordingly, the Commission's path is clear) and to provide the Commission with further guidance on certain issues where there is no apparent consensus.

A. Commenters Adamantly Oppose the Introduction of Auctions or Other Major Licensing Changes in the Private Radio Services

2. At its core, this proceeding is about the future of the private internal radio services. Before instituting any changes that would have a substantial impact on the private radio community, the Commission should listen to what this community is telling it as to what approach would best serve the public interest and the interests of private spectrum users. And, at least with respect to some of the fundamental questions at issue in this proceeding, the message that the private user community is trying to convey to the

Commission is loud and clear. Most significantly: **the Commission should continue to license and assign private spectrum on a site-by-site, non-auctioned basis.**^{3/} Rarely has there been such widespread agreement among such a diverse group of interests; yet, again and again, the overwhelming majority of commenting parties unequivocally and vociferously advocate this same conclusion.

3. The reasoning behind this conclusion -- as expressed by one commenter after another -- is lucid and well-founded:

- a. *Congress has emphasized the Commission's obligation to seek to avoid mutual exclusivity among license applicants before imposing competitive bidding on a particular spectrum band.*
- b. *The existing private radio bands already are licensed in a manner that typically avoids mutual exclusivity.*
- c. *The current site-by-site licensing approach best serves the unique coverage requirements and other needs of private licensees.*

^{3/} See, e.g., Comments of Alliant Energy; American Electric Power Service Corp.; American Automobile Association; API; Association of American Railroads; the Boeing Company ("Boeing"); CellNet Data Systems, Inc. ("CellNet"); the Central Station Alarm Association; Cinergy Corporation; Commonwealth Edison Company; Entergy Services, Inc.; Forest Industries Telecommunications ("FIT"); Ford Communications, Inc. ("Ford"); the Industrial Telecommunications Association, Council of Independent Communications Suppliers, Taxicab & Livery Communications Council and the Telephone Maintenance Frequency Advisory Committee ("ITA, *et al.*"); Intek Global Corp.; International Communications Association; Kenwood Communications Corp.; the Land Mobile Communications Council ("LMCC"); Lincoln Water System; Motorola; MRFAC, Inc. ("MRFAC"); the North Texas Communications Council ("NTCC"); the Personal Communications Industry Association ("PCIA"); the Private Internal Radio Service Coalition; Ray's Radio Shop, Inc.; Scana Corporation; Small Business in Telecommunications ("SBT"); Trimble Navigation Limited; Union Electric Company; United Telecom Council ("UTC"); Western Communications, Inc.; Western Resources; WinStar Communications, Inc.; and Wisconsin Public Service Corporation.

- d. *Thus, it would be contrary to both the public interest and the Balanced Budget Act of 1997 ("Budget Act") for the Commission to create mutual exclusivity in these bands as a means for introducing auctions.^{4/}*

In other words, the Commission cannot hide behind the Budget Act as justification for imposing auctions in the private bands; rather than mandating auctions, the Budget Act does just the opposite under the circumstances presented here.

4. API is aware of only two commenting parties that appear to favor the introduction of auctions in the private radio bands: Nextel Communications, Inc. ("Nextel") and its trade association, the American Mobile Telecommunications Association ("AMTA"). This is hardly surprising, as Nextel is a commercial service provider and *not* a user of private internal radio services. As such, Nextel would like nothing better than for all private spectrum to be auctioned and, as a likely result, converted to commercial use, both so that Nextel can obtain more spectrum for itself (thereby strengthening its position in the commercial marketplace) and so that it can increase its customer base by providing service to private user entities that find their own spectrum has been eroded by Nextel and other commercial providers. Nextel and AMTA fail to explain, however, how the creation of mutual exclusivity in the private bands (so as to implement auctions) would be consistent with the Budget Act. Further, and as many commenters note, commercial services such as those offered by Nextel often are not an

^{4/} These positions are expressed in many of the Comments identified above in footnote 3.

adequate substitute for private internal systems.^{5/} Nor is it practical or appropriate to expect the typical private spectrum user to obtain its spectrum at auction and to meet its needs through geographic licensing.^{6/}

5. When the private internal user relies upon its system to provide important safety-related services -- as is the case with critical infrastructure industries such as pipelines, petroleum companies, utilities and railroads -- the potential shortcomings associated with commercial systems (and the resulting need for private spectrum) are further amplified. As one gas and electric utility compellingly explained:

Storm damage can leave thousands of customers without electricity. The factories and mills in our service area shut down when electric service is interrupted. The farmer's milk spoils when there is no power to his cooler. Traffic lights go out and the city becomes paralyzed. Homeowners worry about the food in their freezers and the rising water in their basements. Everybody wants their power restored ASAP. Meanwhile everyone stuck in a traffic jam is using their cell phone to tell somebody that they will be late. SMR users are unable to dispatch their crews because the repeater site is without power. **THIS IS WHY WE NEED OUR OWN PRIVATE RADIO SYSTEM.**^{7/}

Likewise, it also would be inappropriate for the Commission to auction overlay licenses in the existing private land mobile bands and to require the relocation of incumbent

^{5/} See, e.g., Comments of Alliant Energy; API; FIT; Lubrizol; and Wisconsin Public Service Corporation.

^{6/} For a discussion of the many reasons why this is the case, see, e.g., Comments of Boeing; FIT; MRFAC; the Private Internal Radio Service Coalition; Ray's Radio Shop, Inc.; and UTC.

^{7/} Comments of Wisconsin Public Service Corporation at 2 (emphasis in original).

operations, as it would present “huge risks to a service that has proven invaluable to America’s safety and economic development.”^{8/}

6. In view of the foregoing, API implores the Commission to recognize that the public interest is better served and protected here by the continued availability of private spectrum for internal use by critical infrastructure industries and other private entities that use their systems for safety purposes than by the flooding of the consumer or industrial telecommunications markets with still more commercial service options. In short, the Commission should not allow a self-interested commercial provider (or its trade association) to dictate the outcome of a proceeding that is meant to determine how best to meet the needs of private spectrum users and those of the public at large.

7. API also notes that almost all commenting parties to address the issue were opposed to the potential auctioning of “Band Manager” licenses in the private radio services.^{9/} These commenters voiced a wide variety of serious concerns, including:

^{8/} Comments of Motorola at 4. See also Comments of Western Communications, Inc. at 5 (auctioning private spectrum “would have an incredible negative economic impact and would be very disruptive to the safety and productivity of small businesses and individuals”).

^{9/} See, e.g., Comments of American Water Works Association (“AWWA”); Boeing; Cinergy Corporation; Commonwealth Edison Company; Entergy Services, Inc.; Ford; ITA *et al.*; International Communications Association; Kenwood Communications Corp.; MRFAC; NTCC; On Site Communications; PCIA; the Private Internal Radio Service Coalition; Ray’s Radio Shop, Inc.; Scana Corporation; SBT; Union Electric Company; UTC; Western Communications, Inc.; and Western Resources.

(1) that providers of auction-exempt “public safety radio services” would (improperly) be required to acquire their spectrum from Band Managers at a significant cost; (2) that the Commission would be abdicating its public interest role in spectrum management; and (3) that the Commission would be vesting substantial power in self-interested private parties who may be inclined to monopolize or warehouse private spectrum. In light of such fervent opposition and the absence of any meaningful support^{10/}, the Commission should not pursue the Band Manager concept. If the Commission nevertheless decides to embark down this road, it should -- at the very least -- initiate a separate proceeding to adequately address the statutory and other concerns that have been raised.

B. Critical Infrastructure Industries are Auction-Exempt and Should Not Be Subject to Any New Use Restrictions

8. Yet another issue on which there is widespread agreement is that Critical Infrastructure Industries (“CII”) such as pipelines, petroleum companies, utilities and railroads provide important safety-related functions and, as a result, fall within the auction exemption for “public safety radio services.” While some commenters argue that the exemption should be construed more broadly to include other types of private licensees as well, it is clear, based on the statutory language, the associated Conference

^{10/} API is unaware of any commenters that overtly supported the auctioning of “Band Manager” licenses. AMTA, however, stated that it “does not oppose” the Band Manager concept. Comments of AMTA at 12.

Report and the Comments filed herein, that CII entities should, *at a minimum*, be covered.^{11/}

9. Standing alone in opposition to the weight of reasoned opinion on this issue is Nextel, which argues that only the traditional *governmental* public safety pools and spectrum should be deemed auction-exempt.^{12/} Simply stated, Nextel's position is absurd. The auction exemption plainly states that it includes not only state and local governments, but also "private internal radio services" that are used by non-governmental entities to promote public safety.^{13/} Further, according to the legislative history for the Budget Act, the auction exemption is "much broader" than the traditional definition of "public safety services" and includes the private systems used by pipelines, utilities,

^{11/} The following comments are among those that either directly support the proposition that CII entities are auction-exempt or advocate a broader definition of "public safety radio services" that necessarily would include the CII as well as other industries: Comments of AWWA; AAR; API; CellNet; the Central Station Alarm Association; Cinergy Corporation; Citizens Water Resources; City of Calhoun, GA Water System; City of Lincoln Water System; Commonwealth Edison Company; DeKalb County Public Works Department; East Bay Municipal Utility District; Entergy Services, Inc.; ITA *et al.*; Intek Global Corp.; International Communications Association; Joint Comments of UTC, API and AAR; Kenwood Communications Corp.; LMCC; Minnesota Power Inc.; Motorola; MRFAC; NTCC; PCIA; Radscan, Inc.; San Francisco Public Utilities Commission; Scana Corporation; SBT; Union Electric Company; United Water Idaho Inc.; United Water New Jersey; UTC; and Western Resources.

^{12/} See Comments of Nextel at 8-9.

^{13/} 47 U.S.C. § 309(j)(2).

railroads and other entities.^{14/} Accordingly, Nextel's proposed interpretation of the exemption should be rejected as flatly inconsistent with both the explicit language of the statute and Congressional intent. Moreover, as a pure matter of public policy, the Commission should recognize that requiring CII entities to compete for their spectrum at auction would threaten the safe operation of our nation's energy and transportation infrastructures.

10. The Commission also should follow the sound advice of the many commenting parties that urge it *not* to impose any "principal use" restrictions or prohibit routine business communications on auction-exempt spectrum.^{15/} As Central and South West Corporation ("CSW") persuasively argues:

CSW is . . . concerned that the new rules proposed might limit its use of the [auction-exempt] system to emergency situations, forcing it to have, or purchase communications services, from a second parallel network to support its day-to-day utility functions. Such a requirement would be utterly impractical, both in terms of costs and implementation. It is simply unrealistic to expect crews to carry two sets of mobile phones and decide for each call which mobile phone is permitted to be used.

^{14/} H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997).

^{15/} See, e.g., Comments of American Electric Power Service Corp; AAR; Baltimore Gas and Electric Company; Boeing; CellNet; Central and South West Corporation; Cinergy Corporation; Commonwealth Edison Company; Entergy Services, Inc.; Ford; ITA *et al.*; Joint Comments of UTC, API and AAR; LMCC; Minnesota Power Inc.; MRFAC; the Private Internal Radio Service Coalition; Scana Corporation; Union Electric Company; and UTC.

Comments of CSW at 2. Similarly, Boeing notes in this regard that it would be illogical to allow it to use its auction-exempt private internal radio system only “to protect the safety of its employees and property, but not for the purposes of improved productivity and for day to day business needs,” as it “would lead to inefficient use of valuable radio spectrum.” Comments of Boeing at 11. API strongly agrees that such a ludicrous result is neither intended nor required by the Budget Act. Instead, it is entirely consistent with the statute (as well as the public interest) to permit auction-exempt spectrum to be used for non safety-related communications, so long as at least one of the functions of the system in question is to protect the safety of life, health or property.^{16/}

C. The “Separate Pools” Approach Should Be Pursued

11. To implement the “public safety radio services” exemption in a practical and effective manner, many commenters (including API) support the creation of a third frequency pool for auction-exempt private licensees, separate from both the pool of non-exempt private licensees and the “public safety” pool for governmental entities.^{17/}

^{16/} See Joint Comments of UTC, API and AAR. API also notes, as it has before on a number of occasions, that many “routine business communications” in the oil and gas industries promote public safety by detecting, averting and/or remedying conditions that may ultimately lead to an emergency situation if left undetected or unaddressed.

^{17/} See, e.g., Comments of AAA; API; AWWA; APCO; Baltimore Gas and Electric Company; the Central Station Alarm Association; Citizens Water Resources; City of Calhoun, GA Water System; City of Lincoln Water System; DeKalb County Public Works Department; East Bay Municipal Utility District; Hewlett-Packard Company; the
(continued...)

Admittedly, some parties have expressed opposition to the “separate pools” approach. As discussed below, however, API does not believe that any meritorious arguments have been presented by these parties.

12. Some commenters contend that separate pools are unnecessary because the Commission’s recent *Second Memorandum Opinion and Order* (“*Second MO&O*”) in its “refarming” proceeding (PR Docket No. 92-235) already assures to CII (auction-exempt) entities all needed protection from interference through the adoption of certain coordination procedures.^{18/} This argument misses the mark. To begin with, the purpose of the proposed “third pool” approach is not only to protect auction-exempt operations from interference, but also to separate auctionable and non-auctionable services in the event that auctions are imposed and to ensure continued and adequate frequency availability to auction-exempt entities. While the *Second MO&O* may help to avert interference problems in the “refarmed” bands, it does not address these other concerns, nor does it present a solution to these problems with regard to other existing private radio frequency bands or any new spectrum that may be assigned (e.g., the 932/941 MHz

^{17/} (...continued)

International Municipal Signal Association and the International Association of Fire Chiefs; Joint Comments of UTC, API and AAR; Minnesota Power Inc.; National Association of Water Companies; San Juan Water District; UTC; and Western Resources.

^{18/} See Comments of ITA *et al.* at 12; MRFAC at 12; NTCC at 12; and PCIA at 18.

Multiple Address System ("MAS") band^{19/}). In any event, before the new coordination procedures adopted in the *Second MO&O* even took effect, the Commission stayed their implementation in response to Requests for Stay and associated Petitions for Reconsideration filed by MRFAC and FIT.^{20/} As a result, vital CII operations will remain vulnerable to unwarranted interference from new licensees for an indefinite period of time while the Commission ponders the record in the "refarming" proceeding.

13. Several parties also claim that the "third pool" proposal is at odds with the Commission's goal in the "refarming" proceeding of consolidating frequency pools in the interests of spectrum efficiency.^{21/} API does not believe, however, that the creation of one new frequency pool -- thereby increasing the total number of pools from two to three -- would undermine in any measurable way the supposed efficiency gains to be realized from the consolidation of the *twenty* pools that previously existed. Indeed, any concerns about reduced efficiency can be allayed by apportioning channels among the pools in a rational manner that takes into account the extent to which the various industries in

^{19/} While Radscan, Inc. acknowledges that there may be a need to create an auction-exempt pool of spectrum in the 932/941 MHz MAS band, it opposes such a result in the 928/952/956 MHz MAS bands due to its proclaimed need for continued access to this spectrum. Comments of Radscan, Inc. at 5-8. API believes that the band-specific concerns of Radscan, Inc. should be assessed within the context of the Commission's ongoing MAS proceeding (WT Docket No. 97-81), rather than in this proceeding.

^{20/} *Fourth Memorandum Opinion and Order*, PR Docket No. 92-235, FCC 99-203 (Aug. 5, 1999).

^{21/} See Comments of Ford at 2; ITA *et al.* at 12-13; NTCC at 12; PCIA at 18-19.

question utilize particular channels throughout the nation.^{22/} Moreover, the consolidated frequency pools were adopted prior to the enactment of the Budget Act and, therefore, at a time when all private radio services were exempt from auctions. It is entirely reasonable and appropriate for the Commission to modify its approach in order to distinguish between newly created statutory categories of private spectrum users.

14. Another argument raised is that there is no need for a separate pool to segregate exempt and non-exempt services because all private industrial licensees are auction-exempt and because the vast majority of cases of mutual exclusivity in the private bands can be resolved through engineering solutions, rather than auctions.^{23/} As discussed in Section I.A. above, API agrees that auctions are not appropriate in the private bands due to the typical absence of mutual exclusivity among license applicants. However, API believes that the creation of a third pool in all existing and future private bands is warranted both to preserve the integrity and availability of frequencies used for important “public safety radio services” and so that the auction exemption can be readily

^{22/} UTC, API and AAR used such a methodology in preparing their “public service pool” Petition for Rule Making (RM-9405). Nevertheless, in the event that inefficiencies are subsequently identified, they could be addressed through the adoption of special footnotes to the frequency table and/or use of the rule waiver process.

^{23/} Comments of MRFAC at 12. See also Comments of SBT at 5 (claiming that a third pool is needed only if: (1) auctions are deemed necessary in the private bands to satisfy Congressional objectives; (2) the Commission determines that the public interest would be served by such auctions; (3) the third pool would be made available to all entities that satisfy the auction exemption; and (4) no alternative licensing methods are reasonably available which would avoid the creation of mutual exclusivity).

implemented in the event that the Commission nonetheless decides to auction any private spectrum. Additionally, while API agrees that the auction exemption may be broad enough to include industries other than the CII, it does not believe that *all* private services can satisfy the exemption. If Congress had intended to establish an exemption that essentially swallowed the rule, it would have done so more explicitly. As a final matter, API notes that it would not be opposed to the inclusion in the “third pool” of any additional non-governmental services that are deemed to be auction-exempt, provided that (1) the number of frequencies in the pool is appropriately expanded to accommodate a greater number of users; and (2) coordination procedures are implemented to provide adequate protection from interference to auction-exempt systems.^{24/}

II. CONCLUSION

15. Notwithstanding the broad array of parties to comment on the Commission’s *NPRM* in this proceeding, a consensus has emerged in support of the following positions: (1) the imposition of auctions in the existing private radio bands would contravene the Budget Act; (2) the “Band Manager” concept is ill-advised; (3) the auction exemption for “public safety radio services” includes Critical Infrastructure

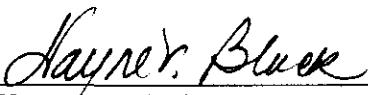
^{24/} See Comments of FIT at 9 (requesting that the forestry service be included in any “third pool” that is created). In its Comments filed on December 23, 1998 in response to the UTC/API/AAR “public service” pool Petition (RM-9405), FIT primarily seems concerned that, if a “third pool” is created, the forestry industry will lose access to frequencies that it traditionally has relied upon. As discussed above, however, API believes that the “third pool” approach should be implemented through an equitable division of frequencies that recognizes the needs of all user groups.

providers and possibly other private industrial spectrum users; and (4) licensees in auction-exempt services should be permitted to use their systems for both public safety and other communications. Many parties also advocate the creation of a separate "public service" pool for non-governmental auction-exempt services. API continues to encourage the Commission to pursue this approach as a rational and appropriate method to implement the auction exemption while promoting the viability and effectiveness of the vital public safety radio systems that support our nation's critical infrastructure.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Reply Comments and urges the Federal Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

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